No. 07-713

FILED
DEC 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GLADYS CHEHARDY, DANIEL FONTANEZ, JACQUELYN FONTANEZ, LARRY FORSTER, GLENDY FORSTER, *et al.*,

Petitioners,

v.

ALLSTATE INDEMNITY COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT STATE FARM FIRE AND CASUALTY COMPANY

WAYNE J. LEE
STEPHEN G. BULLOCK
MARY L. DUMESTRE
ANDREA L. FANNIN
HEATHER S. LONIAN
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Respondent State Farm Fire and Casualty Company

QUESTION PRESENTED

Did the Fifth Circuit act within its sound discretion in declining to certify to the Louisiana Supreme Court the question of whether the water damage exclusions in Plaintiffs' insurance policies excluded flood damage resulting from levee breaches during Hurricane Katrina?

CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Fire and Casualty Company is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company. State Farm Mutual Automobile Insurance Company is a mutual insurance company and has no parent company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE FIFTH CIRCUIT PERMISSIBLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION OF THE INTERPRETATION OF THE WATER DAMAGE EXCLUSIONS TO THE LOUISIANA SUPREME COURT 6

II. A GRANT-VACATE-REMAND ORDER IS INAPPROPRIATE IN THIS CASE 12

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE WATER DAMAGE EXCLUSIONS IN THE POLICIES AT ISSUE UNAMBIGUOUSLY EXCLUDE ALL FLOOD DAMAGE 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Arias-Benn v. State Farm Fire & Casualty Insurance Co., 495 F.3d 228 (5th Cir. 2007) 8

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7

Bellotti v. Baird, 428 U.S. 132 (1976) 7

Boston Old Colony Insurance Co. v. Tiner Associates Inc., 288 F.3d 222 (5th Cir. 2002) 8

Branch-Hines v. Hebert, 939 F.2d 1311 (5th Cir. 1991) 5

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) ... 8-9

Chevron USA, Inc. v. Vermilion Parish School Bd., 377 F.3d 459 (5th Cir. 2004) 11

Citizen Comm. For Better Law Enforcement v. Lafayette, 685 So. 2d 289 (La. Ct. App. 1966) 10

Commercial Union Insurance Co. v. Advance Coating Co., 351 So. 2d 1183 (La. 1977) 15

FDIC v. Abraham, 137 F.3d 264 (5th Cir. 1998) 10-11

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 10

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 9

Harrison v. NAACP, 360 U.S. 167 (1959) 7

Huddleston v. Dwyer, 322 U.S. 232 (1944) 13

Jesco Construction Corp. v. Nationsbank Corp.,
278 F.3d 444 (5th Cir. 2001)..... 10

In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. 2007)..... *passim*

Lawrence v. Chater, 516 U.S. 163 (1996)..... 12, 13

Lehman Brothers v. Schein, 416 U.S. 386 (1974)..... 7, 8, 11

Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Co.,
520 U.S. 893 (1997)..... 12

OneBeacon Insurance Co. v. Don's Building Supply, Inc., 496 F.3d 361 (5th Cir. 2007)..... 10

Prytania Park Hotel, Ltd. v. General Star Indemnity Co.,
179 F.3d 169 (5th Cir. 1999)..... 8

Rescue Army v. Municipal Court of Los Angeles,
331 U.S. 549 (1947)..... 7

Sher v. Lafayette Insurance Co., No. 2007
-CA-0757, 2007 WL 4247708
(La. Ct. App. Nov. 19, 2007) ..... *passim*

St. Paul Fire & Marine Insurance Co. v. Barry,
438 U.S. 531 (1978)..... 8

Swearingen v. Owens-Corning Fiberglass Corp.,
968 F.2d 559 (5th Cir. 1992)..... 9

Thermo Terratech v. GDC Enviro-Solutions, Inc., 265 F.3d 329 (5th Cir. 2001) 8

Thomas v. American Home Products, Inc., 519 U.S. 913 (1996) 12

Times-Picayune Publishing Corp. v. Zurich American Insurance Co., 421 F.3d. 328 (5th Cir. 2005) 8

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 7

Transcontinental Gas Pipeline Corp. v. Transportation Insurance Co., 958 F.2d 622 (5th Cir. 1992) 8-9

Williamson v. Elf Aquitaine, Inc., 138 F.3d 546 (5th Cir. 1998) 9

Statutes and Rules **Page(s)**

15 U.S.C. § 1011 8

28 U.S.C. § 1292(b) 2

Federal Rule of Civil Procedure 12(b)(6) 1

Supreme Court Rule 10 6

STATEMENT OF CASE

Plaintiffs-Petitioners ("Plaintiffs") are putative representatives of a class of residents of Orleans, Jefferson, and St. Bernard parishes whose properties sustained flood and other damage during Hurricane Katrina. Plaintiffs were issued homeowners or other property insurance policies by Defendant-Respondent State Farm Fire and Casualty Company ("State Farm") and the other defendant insurers. State Farm's policies, like the policies issued by the other insurers, exclude damage caused by flood, waves, tidal water, the overflow of a body of water, and other water perils. State Farm's policies also contain lead-in language providing that the exclusions apply regardless of the cause of the excluded event.

Plaintiffs filed suit in Louisiana state court, contending that the damage to their properties was covered by their policies notwithstanding the water damage exclusions. In support of their claims, Plaintiffs allege that the flooding of New Orleans and the surrounding parishes was caused by the negligent design, construction, or maintenance of the levees and other flood-control systems and that the use of the term "flood" in the water damage exclusions in their policies is ambiguous and does not cover "man-made" flooding.

Plaintiffs' case was removed to the United States District Court for the Middle District of Louisiana. The case was subsequently transferred to the Eastern District of Louisiana and consolidated with related cases for pretrial proceedings before the Honorable Judge Stanwood R. Duval, Jr. State Farm and other insurer defendants moved to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting, *inter alia*, that the damage to Plaintiffs' properties was not covered due to the unambiguous water damage exclusions in the policies.

The District Court issued an Order dated November 27, 2006, granting State Farm's motion to dismiss but denying those of the other insurer defendants. The District Court

ruled that the term "flood" as used in the water damage exclusions was ambiguous because it did not specify whether it referred only to naturally-occurring floods or also to floods caused by man-made events or human negligence. Given this perceived ambiguity, the Court held that the term flood must be interpreted narrowly in favor of the policyholder to mean only naturally-occurring floods, thus creating coverage for man-made flooding. However, the District Court granted State Farm's motion to dismiss, holding that the lead-in language to the water damage exclusion in State Farm's policies resolved any ambiguity and clearly excluded flood damage regardless of the cause of the flooding. (Appendix to the Petition ("App.") 150-51).

The District Court certified its Order *sua sponte* for interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b). The other insurer defendants moved before the Fifth Circuit for leave to appeal the District Court's ruling that the water damage exclusions were ambiguous, and Plaintiffs sought leave to appeal the ruling granting State Farm's motion to dismiss on the basis of the lead-in language. The Fifth Circuit granted both the other insurers' and Plaintiffs' petitions for leave to appeal. On February 1, 2007, Plaintiffs moved the Fifth Circuit to certify certain questions regarding the correct interpretation of the insurance policies to the Louisiana Supreme Court.

In an opinion dated August 2, 2007, the Fifth Circuit reversed the District Court's holding that the term flood was ambiguous and should be construed to mean only "naturally-occurring flood." The Fifth Circuit did so after conducting a thorough review of Louisiana law on contract interpretation, numerous dictionary and treatise definitions of the word "flood," and a substantial body of jurisprudence from Louisiana and across the country interpreting water damage exclusions. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 209-21 (5th Cir. 2007) (App. 36-66). The Fifth Circuit concluded that

> the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. . . . This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.

Id. at 221 (App. 66).

Accordingly, the Fifth Circuit vacated the denial of the other insurers' motions to dismiss and affirmed the dismissal of Plaintiffs' claims against State Farm, without reaching the issue of the lead-in language relied on by the District Court. In its opinion, the Fifth Circuit also denied Plaintiffs' motion to certify questions to the Louisiana Supreme Court. The Fifth Circuit declined to certify questions "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal . . . ." *Id.* at 208 n.11 (App. 35-36 n.11). The Fifth Circuit denied Plaintiffs' motion for rehearing *en banc* and motion for a stay of mandate in orders dated August 27, 2007. (App. 200).

On November 19, 2007, the Louisiana Fourth Circuit Court of Appeal issued an opinion addressing, *inter alia*, the interpretation of a water damage exclusion in the context of flood damage resulting from levee breaches. *See Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757, 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007) (App. 202). A two-judge plurality of the Court of Appeal found that the term "flood" was ambiguous as used in the water damage exclusion in the plaintiff's policy and that the policy should be construed in the insured's favor to cover his flood damage. *See id.* at *3-5 (plurality opinion) (Love, J., joined by McKay, J.) (App. 210-14). The two-judge plurality opinion did not discuss or even mention the Fifth Circuit's comprehensive opinion in the present

case addressing precisely the same issue. *See id.* The other three judges on the appellate panel in *Sher* declined to join the plurality opinion's finding that the term "flood" in the water damage exclusion was ambiguous: one judge concurred only in the result,[1] and two judges filed separate opinions specifically disagreeing with the finding of ambiguity and the reasoning behind it.[2]

Plaintiffs now urge this Court to grant certiorari, vacate the Fifth Circuit's affirmance of the grant of State Farm's motion to dismiss and reversal of the District Court's ruling on the other defendant insurers' motions to dismiss, and remand with instructions to certify certain questions to the Louisiana Supreme Court or, alternatively, with instructions to stay its mandate until such time as the *Sher* decision may be addressed by the Louisiana Supreme Court.

REASONS FOR DENYING THE WRIT

This case meets none of this Court's criteria for granting certiorari. There is no conflict as to any question of federal law between the Circuit Courts, between the Fifth Circuit and a state high court, or between the Fifth Circuit and any decision of this Court. Nor has the Fifth Circuit departed from

---

[1] Judge Murray concurred only in the result and declined to join in the plurality opinion's finding of ambiguity as to the term "flood." *Sher*, 2007 WL 4247708 at *20 (Murray, J.) (App. 251).

[2] Judge Tobias concurred in the result, but specifically disagreed with the plurality's finding of ambiguity, stating that "it is clear that the word 'flood' applied to any and all floods." *Sher*, 2007 WL 4247708 at *20 (Tobias, J., concurring in result) (App. 252). Judge Cannizzaro dissented in part from the plurality opinion, finding "no merit in the majority's [sic] conclusion that the term 'flood' as utilized in the policy at hand is susceptible to different meanings thereby rendering the water damage exclusion inapplicable. . . . Based upon my review, the term 'flood', as well as the entirety of the exclusion, is clear and unambiguous." *Id.* at *23 (Cannizzaro, J., dissenting in part) (App. 261-62).

the usual practice and course of proceedings so as to justify the exercise of this Court's supervisory power.

To the contrary, the Fifth Circuit acted well within the bounds of its discretion in declining to certify to the Louisiana Supreme Court the issue of contract interpretation raised by Plaintiffs' claim that the water damage exclusions in their insurance policies are ambiguous with respect to flood damage resulting from levee breaches. In examining and deciding the merits of that claim, the Fifth Circuit was guided by Louisiana principles of contract interpretation with which it is familiar, having had ample experience applying those principles in a variety of contexts.

In addition, this case does not present the federalism and other concerns that, under this Court's jurisprudence, counsel the federal courts to defer to the state court on an issue of state law. The Fifth Circuit has not invalidated a state law on federal constitutional grounds, or construed a state statute at all, and has not ventured into legal territory where it is an "outsider." Furthermore, the Fifth Circuit acted in accordance with its established standards for certification and with its prior decisions. The Fifth Circuit's decision not to certify is also amply supported by the established precedents of this Court. Requiring the United States Courts of Appeal to certify questions in cases such as this, as Plaintiffs propose, will only result in delay and obstruction in the functioning of the federal courts in diversity cases.

While this Court does not sit to review the federal court interpretation of state contract law, the manifest correctness of the Fifth Circuit's decision also establishes that no grant of certiorari is warranted in this case. Accordingly, for these reasons and those set forth below, Plaintiffs' Petition should be denied.

I. THE FIFTH CIRCUIT PERMISSIBLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE QUESTION OF THE INTERPRETATION OF THE WATER DAMAGE EXCLUSIONS TO THE LOUISIANA SUPREME COURT

The United States Circuit Courts of Appeal have broad discretion in determining whether to certify a question of state law to a state supreme court. Indeed, as the Fifth Circuit has stated, the Circuit Courts have a duty to explicate and decide issues of state law in diversity cases. *See Branch-Hines v. Hebert*, 939 F.2d 1311, 1320 (5th Cir. 1991) ("Under the *Erie* doctrine, . . . where the state courts have not yet decided a particular question, it is the duty of the federal court to decide what the state court would hold if faced with it.").

Plaintiffs' Petition raises no novel or unsettled issue as to the scope of a Circuit Court's discretion to certify or decline to certify an issue of state law. Plaintiffs do not ask this Court to resolve any conflict among the Circuits or any conflict with any decision of this Court as to the standards and principles governing the exercise of that discretion. Moreover, the Fifth Circuit's decision not to certify issues to the Louisiana Supreme Court does not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power. Indeed, as shown below, the Fifth Circuit's decision not to certify was well within the bounds of its discretion. Accordingly, the Fifth Circuit's denial of Plaintiffs' motion for certification presents no issue of federal law requiring resolution by this Court and satisfies none of this Court's criteria for granting certiorari. *See* Sup. Ct. R. 10.

In this case, the Fifth Circuit properly undertook to apply settled Louisiana principles of contract interpretation set forth in the relevant Louisiana statutes and case law to the straightforward issues of contract interpretation presented by Plaintiffs' claims. Moreover, although the Louisiana Su-

preme Court has not issued a definitive interpretation of the relevant policy language, courts nationwide have uniformly interpreted similar insurance policy exclusions in the same manner as the Fifth Circuit did in the present case, and the Fifth Circuit's decision is squarely supported by that overwhelming precedent. *See In re Katrina*, 495 F.3d at 212-14 (citing cases finding "flood" includes inundation from a burst levee, dam or dike) (App. 43-49). In short, the Fifth Circuit was not entering uncharted territory or basing its decision upon unsupported conjecture. Rather, it reached the right result based upon the more than sufficient guidance provided by established principles of Louisiana law and a uniform nationwide body of persuasive authority. *See infra* at Point III.

Nor are other concerns present that have led this Court in the past to review a Circuit Court's decision not to certify a question to a state high court or otherwise defer a decision as to a state law issue. This case does not present the strong federalism concerns that exist where certification could avoid an unnecessary federal determination of the constitutionality of a state statute. For example, in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), cited by Plaintiffs, this Court vacated an en banc decision by the Ninth Circuit construing an amendment to the Arizona constitution and holding that the amendment, as construed, was overbroad and unconstitutional. In the course of holding that the case was moot given that the plaintiff, who had sued as a public employee of the state of Arizona, had left her job, this Court emphasized the special federalism concerns that arise where "a federal court is asked to *invalidate* a State's law." *Id.* at 79 (emphasis added) (citing *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 573-74 (1947)).[3] *See also Bel-*

---

[3] Plaintiffs also cite Justice Stevens' dissent in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 777 (2005), but neglect to mention that that case likewise involved a situation where a decision by a state supreme court on state law issues could have rendered it unnecessary to address the constitutional question.

lotti v. Baird, 428 U.S. 132, 147 (1976) (court should have abstained and certified question "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication'") (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

Likewise, this Court has favored certification when (unlike here) the federal court is applying the unfamiliar law of a distant state. Thus, in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court remanded a case to the Second Circuit for further consideration of whether that court should certify a question of Florida law to the Florida Supreme Court. *See id.* at 391-92. The Court explained that

> resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 391.

Here, in contrast, the Fifth Circuit was called upon to interpret an insurance policy by applying rules of contract interpretation that it is accustomed to apply.[4] As this Court

---

[4] There are myriad examples of the Fifth Circuit applying Louisiana rules of insurance contract interpretation. *See, e.g.*, *Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 230 (5th Cir. 2007) (in Hurricane Katrina case, interpreting insurance policy under Louisiana law); *Times-Picayune Publ'g Corp. v. Zurich Am. Ins. Co.*, 421 F.3d 328 (5th Cir. 2005) (interpreting excess employee dishonesty policy in diversity action); *Boston Old Colony Ins. Co. v. Tiner Assocs. Inc.*, 288 F.3d 222 (5th Cir. 2002) (interpreting care, custody, or control exclusion to excess insurance policy); *Thermo Terratech v. GDC Enviro-Solutions, Inc.*, 265 F.3d 329 (5th Cir. 2001) (interpreting coverage exclusions in CGL policy); *Pryta-*

(cont'd)

stated in *Lehman Brothers*, in such circumstances, federal judges have "the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.*, 416 U.S. at 391.[5] *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) ("Normally . . . we defer to the construction of a state statute given it by the lower federal courts. We do so not only to 'render unnecessary review of their decisions in this respect,' but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.") (citations omitted).

Plaintiffs also wrongly contend that the Fifth Circuit in this case did not follow its own standards regarding certification. (Pet. at 10). The Fifth Circuit has held that "[t]he most important [factors with respect to certification] are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998) (denying motion for certification where "Mississippi case law . . . is sufficiently clear to allow this

---

(cont'd from previous page)
nia Park Hotel Ltd. v. Gen. Star Indem. Co., 179 F.3d 169 (5th Cir. 1999) (interpreting coverage provision of hotel insurance policy).

[5] Plaintiffs erroneously suggest that certification here was warranted because "[h]istorically, insurance has been an area over which 'the States [have] enjoyed a virtually exclusive domain.'" (Pet. at 8-9) (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978); 15 U.S.C. § 1011.) Plaintiffs' cited authorities support only the proposition that a state possesses broad authority in *regulating* insurance. *See Barry*, 438 U.S. at 539; 15 U.S.C. § 1011. Those authorities in no way support the suggestion that federal courts may not properly decide a straightforward issue of insurance interpretation such as that presented by this case, even if the specific issue has not been decided by the highest state court. *Cf. Transcon. Gas Pipeline Corp. v. Transp. Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992) (per curiam) ("[c]ertification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state. Neither is it to be used as a convenient way to duck our responsibility in . . . diversity jurisdiction").

court to decide the issue presented") (quoting *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976) (declining to certify question regarding powers of Florida Attorney General to Florida Supreme Court and observing that in a case which "concerns 'the fundamental political structure of the State of Florida' . . . "[c]omity considerations are more applicable . . . than in [a case] involving, for example, the interpretation of a clause in an insurance contract")). Here, the Fifth Circuit, consistent with these factors, properly declined to certify questions "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal." *In re Katrina*, 495 F.3d at 208 n.11 (App. 35-36 n.11) (citing *Swearingen v. Owens-Corning Fiberglass Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) (denying certification where "our decisional analysis is relatively straightforward.")).

Plaintiffs further assert that the Fifth Circuit's decision not to order certification in this case is inconsistent with its decisions to certify insurance questions in other cases. (Pet. at 13-15; *see also id.* at 10). Plaintiffs cite to cases in which certification was ordered where there was a clear split of authority among the state intermediate appellate courts on the questions at issue. *See OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 496 F.3d 361, 366 (5th Cir. 2007) (certifying question to Texas Supreme Court where "the Texas appellate courts are split on the appropriate rule"); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 809-11 (5th Cir. 2004) (certifying questions to the Texas Supreme Court where conflicting intermediate appellate court decisions were "irreconcilable"); *Jesco Constr. Corp. v. Nationsbank Corp.*, 278 F.3d 444, 447 (5th Cir. 2001) (certifying questions to Louisiana Supreme Court where "[t]he Louisiana courts of appeals have twice since revisited this issue, reaching opposite results"). No such direct conflict among the state intermediate appellate courts exists in this case, and the Fifth Circuit acted well

within its discretion in declining to certify the straightforward questions of contract interpretation. [6]

Even if the two-judge plurality opinion in *Sher* had been issued before the Fifth Circuit's opinion in this case, the Fifth Circuit would have been under no obligation to follow it or order certification because of it. *See Citizen Comm. for Better Law Enforcement v. Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (a plurality opinion "is of little value as precedent and should properly be limited to the facts of that case only"); *see also FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) (given that "we are chary to rely on–much less be bound by–the holding of one intermediate state appellate court as the harbinger of such a future ruling by the state's highest court, we are doubly so when, as now, the state in question is Louisiana, where the primary sources of law are its constitution, codes, and statutes and the decisions of its courts are secondary sources of law until and unless the number and unanimity of such decisions achieve the force of law through the Civil Law doctrine of *jurisprudence constante*"); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) (similar). Moreover, there is no reason to believe that the Fifth Circuit would have followed, or been in any way influenced by, the two-judge plurality opinion in *Sher*. Unlike the Fifth Circuit's carefully reasoned and well supported opinion in this case, the plurality opinion in *Sher* had little analysis, cited no cases to support its ruling, and did not address the overwhelming authority against the result it reaches. *See infra* at Point III.

In sum, the Fifth Circuit in this case clearly "believe[d] that it c[ould] resolve an issue of state law with available research materials already at hand, and ma[d]e the effort to do so," such that "its determination should not be disturbed sim-

---

[6] Plaintiffs erroneously rely upon the District Court's statement that it would have certified questions to the Louisiana Supreme Court if the pertinent rule permitted. (Pet. at 9-10). Obviously, this statement by the District Court was not in any way binding on the Fifth Circuit.

ply because the certification procedure existed but was not used." *Lehman Bros.*, 416 U.S. at 395 (Rehnquist, J., concurring). Plaintiffs' Petition to have this Court grant certiorari, vacate the judgment below and remand this case with direction to the Fifth Circuit to certify to the Louisiana Supreme Court the issue of construing the water damage policy exclusion is without merit and should be denied.

II. A GRANT-VACATE-REMAND ORDER IS INAPPROPRIATE IN THIS CASE

Plaintiffs ask this Court for the alternative relief of instructing the Fifth Circuit to recall and then stay its mandate pending possible review of the *Sher* decision by the Louisiana Supreme Court. (Pet. at 21). Plaintiffs raise this request only in the Conclusion of their Petition. (*See id.*) Plaintiffs fail to cite any authority that would support such relief. Plaintiffs appear to be asking for a Grant-Vacate-Remand ("GVR") order compelling the Fifth Circuit to recall and stay its mandate and await a possible appellate disposition of *Sher*. However, there is no support in this Court's GVR jurisprudence for the issuance of a GVR order in this case.

This case does not fit "within the category of cases in which [this Court has] held it is proper to issue a GVR order." *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). The category of cases where "'a GVR order is . . . potentially appropriate'" consists of cases "'[w]here intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.'" *Id.* (ellipsis in original) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

Thus, a prerequisite to a GVR order as sought by Plaintiffs is that "the federal-court decision on state law appears to contradict a *subsequent* decision of the state supreme court." *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring). Here, there has been no such recent or intervening development in Louisiana law. There is no decision of the Louisiana Supreme Court that the Fifth Circuit's decision appears to contradict. Plaintiffs merely claim that such a development *may* occur in *Sher*, a case in which the Louisiana Supreme Court has not yet even granted review. State Farm is not aware of any precedent for this Court's issuing a GVR order in circumstances such as those present here, simply on the supposition that a state supreme court might in the future issue a decision contrary to the earlier conclusion of a circuit court in a case. Nor has this Court issued a GVR order directing a circuit court to stay its judgment pending the outcome of an appeal in a state high court where review has been granted.

In *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944), this Court noted the general rule that *while a federal case remains sub judice*, a judgment of the federal court on issues of state law must be reversed on appellate review if in the meantime the state courts have adopted a different rule of law. However, there is no rule that the time during which a case remains sub judice should be extended in anticipation of the possibility of the state court's adopting a different rule of law, which is what Plaintiffs propose here. *Cf. Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (per curiam) ("This Court should not just GVR a case . . . 'because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case.'") (quoting *Lawrence*, 516 U.S. at 189 (Scalia, J., dissenting)).

Further, the balance of the equities does not weigh in favor of the proceeding proposed by Plaintiffs and the delay that such a rule, if adopted, would cause in the issuance of final judgments in diversity cases. Considerations of

"[r]espect for lower courts, the public interest in finality of judgments, and concern about [this Court's] own expanding certiorari docket all counsel against undisciplined GVR'ing." *Lawrence*, 516 U.S. at 174. In addition, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168.

The GVR order (apparently) sought by Plaintiffs would postpone the resolution of this case for the indefinite future, pending a decision from the Louisiana Supreme Court which may never eventuate and which, if it does issue, would most likely accord with the well-reasoned opinion of the Fifth Circuit. Such delay in the case is unwarranted, and Plaintiffs' request that this Court vacate the judgment below and direct the Fifth Circuit to stay its judgment should be denied.

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE WATER DAMAGE EXCLUSIONS IN THE POLICIES AT ISSUE UNAMBIGUOUSLY EXCLUDE ALL FLOOD DAMAGE

The manifest correctness of the Fifth Circuit's construction of the policy term "flood" in the defendant insurers' water damage exclusions underscores the inappropriateness of the relief requested by Plaintiffs in their Petition to this Court. Plaintiffs assert that the Fifth Circuit was wrong on the merits but offer no substantive criticism of the Fifth Circuit's reasoning. Instead, Plaintiffs simply rely upon the fact that the two-judge plurality opinion in *Sher* reached the opposite conclusion.

The Fifth Circuit's comprehensive analysis of the relevant issues speaks for itself and need not be reiterated at length here. It is worth noting, however, that the Fifth Circuit considered and rejected the arguments apparently relied upon by the plurality opinion in *Sher*. In doing so, the Fifth Circuit looked to and analyzed numerous principles of Louisiana contract law, Louisiana judicial decisions on insurance

contract law, and decisions from other jurisdictions addressing the precise issue presented by Plaintiffs' claims as to the definition of flood. The *Sher* plurality opinion, in contrast, cited no cases from Louisiana or any other state regarding this issue and provided remarkably little analysis.

The Fifth Circuit and the *Sher* plurality both recognized that because "flood" was left undefined in the policies, that term must be given its generally prevailing meaning. *In re Katrina*, 495 F.3d at 209 (App. 40); *Sher*, 2007 WL 4247708, at *4 (App. 212). However, their respective analyses diverge from there, both in the depth of the consideration given to the question and the conclusion reached. The Fifth Circuit made a thorough review of a broad range of authorities, including a variety of dictionaries and encyclopedias, insurance treatises, Louisiana cases, and a substantial body of jurisprudence from around the country. *See In re Katrina*, 495 F.3d at 210-14 (App. 41-49). The Fifth Circuit found agreement among those sources that the generally prevailing meaning of "flood" includes all flooding, whether natural or non-natural. *See id.* The *Sher* plurality opinion, on the other hand, simply made the bald assertion that "'flood' is susceptible to different meanings due to varying causes of floods," with no reference to any sources that would support the claimed ambiguity and without addressing or discussing the Fifth Circuit's opinion in this case. *See Sher*, 2007 WL 4247708, at *4 (App. 212).

The *Sher* plurality opinion also erred in its analysis of the water damage exclusion as a whole, incorrectly reasoning that the word "flood" was followed by a list of other purportedly "natural" perils (such as surface water, waves, and overflow of a body of water) and must therefore also be taken to refer to natural floods. *Id.* (App. 213). The Fifth Circuit convincingly rejected this reasoning, citing numerous cases holding that other named events in the water damage exclusion can be both natural or non-natural and that no inference of a limitation of the meaning of "flood" to natural floods could be drawn from the wording of the water damage exclusion. *See In re Katrina*, 495 F.3d at 218-19 (App. 59-60).

Furthermore, the Fifth Circuit properly recognized that the Louisiana Supreme Court has held that, even if "'a word has two meanings, one broad and one more restrictive included within the broader meaning, it does not follow that the narrower meaning was intended.'" *In re Katrina*, 495 F.3d at 211 (App. 41) (quoting *Commercial Union Ins. Co. v. Advance Coating Co.*, 351 So. 2d 1183, 1186 (La. 1977)). The *Sher* plurality opinion ignored that guidance from the Louisiana Supreme Court and concluded without comment that the narrower definition applied. *Sher*, 2007 WL 4247708, at *4 (App. 213).

In sum, the Fifth Circuit conducted a thorough and faithful analysis, as required under *Erie*, to determine what result the Louisiana Supreme Court would reach on the issues of insurance contract interpretation presented by this case. Plaintiffs cite the *Sher* plurality opinion as per se evidence that the Fifth Circuit erred, but that opinion offers no genuine basis to doubt the correctness of the Fifth Circuit's conclusions. Plaintiffs' request to this Court to vacate the judgment of the Fifth Circuit and require that court either to certify the issue to the Louisiana Supreme Court or to stay its mandate for an indefinite period pending a possible decision on the issue from the Louisiana Supreme Court should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

Wayne J. Lee
Stephen G. Bullock
Mary L. Dumestre
Andrea L. Fannin
Heather S. Lonian
Stone Pigman Walther
Wittmann L.L.C.
546 Carondelet Street
New Orleans, Louisiana
70130
(504) 581-3200

Sheila L. Birnbaum
(Counsel of Record)
Douglas W. Dunham
Ellen P. Quackenbos
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000